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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ANTHONY GABRIEL PESQUEIRA, Appellant.	2 CA-CR 2008-0390 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20072811

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Anthony Pesqueira was convicted of one count of first-degree murder and sentenced to life in prison. He raises numerous issues on

appeal. None of them warrants reversal of the conviction or the sentence; therefore we affirm.

Facts and Procedural History

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Two days before the fatal shooting, Pesqueira and the victim had been involved in a public, verbal argument, involving threats and weapons. On the night of the shooting, Pesqueira drove into a gas station parking lot where the victim was standing near his car. While still in his car, Pesqueira raised a gun and quickly fired five or six shots at the victim. One of the shots hit the victim, and he died from his injury. Pesqueira was charged with and subsequently convicted of first-degree murder. This appeal followed.

Premeditation

Rule 20 Motions

¶3 Pesqueira first argues the trial court erred by denying his Rule 20, Ariz. R. Crim. P., motions for judgment of acquittal, arguing there was insufficient evidence to prove the reflection necessary to establish the element of premeditation. Rule 20(a) requires a trial court to enter a judgment of acquittal before a verdict "if there is no substantial evidence to warrant a conviction." Our supreme court has said that "[s]ubstantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). Substantial evidence may be either

circumstantial or direct. *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003).

¶4 We review a denial of a Rule 20 motion for abuse of discretion. *Id.* We will reverse for insufficient evidence "only if 'there is a complete absence of probative facts to support [the jury's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988) (alteration added).

¶5 Pesqueira argues that the state failed to prove he did "anything to plan the murder" or knew the victim was at the gas station before he arrived. However, he has cited no support for the proposition that evidence of planning and previous knowledge is required. Rather, premeditation is usually established by circumstantial evidence because the existence of direct evidence is rare. *See State v. Thompson*, 204 Ariz. 471, ¶ 33, 65 P.3d 420, 429 (2003). The period of reflection does not need to be long. *Id*. ¶ 32 (providing that an appropriate jury instruction on premeditation may include language stating "'the time needed for reflection is not necessarily prolonged, and the space of time between the intent [knowledge] to kill and the act of killing may be very short'") (alteration in *Thompson*).

¶6 The jury reasonably could have concluded that, after the altercation at the nightclub, Pesqueira had reflected as he drove up, saw the victim and fired five or six shots. The number of shots alone can be circumstantial evidence of premeditation. Pesqueira's own testimony that he reacted to the perceived threat of the victim taking out

a gun, although not believed by the jury, showed premeditation. This evidence is sufficient to sustain Pesqueira's first-degree murder conviction. Thus, there is not a "complete absence of probative facts" to support Pesqueira's conviction, and the trial court did not abuse its discretion. *See Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d at 394, *quoting Mauro*, 159 Ariz. at 206, 755 P.2d at 79.

State's Closing Argument

¶7 Pesqueira next argues that the trial court erred by overruling his objection to the prosecutor's discussion of reflection and premeditation during closing statements, contending that the discussion was inappropriate in light of *Thompson* because it "stressed the element of time." Prosecutors are given "wide latitude in presenting their closing arguments to the jury." *State v. Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000). "'[T]hey may argue reasonable inferences from the evidence presented at trial.'" *State v. McKenna*, 222 Ariz. 396, ¶ 28, 214 P.3d 1037, 1046 (App. 2009), *quoting State v. Blackman*, 201 Ariz. 527, ¶ 71, 38 P.3d 1192, 1209 (App. 2002). We review a trial court's ruling on an objection during closing argument for an abuse of discretion. *State v. Roque*, 213 Ariz. 193, ¶ 123, 141 P.3d 368, 398 (2006).

¶8 During his closing statements, the prosecutor used an analogy of a driver approaching a yellow light to explain how reflection might take place quickly. But he actually stressed the element of premeditation when he said, "You have to make a decision." Both before and after this, the prosecutor focused on factors directly related to reflection and premeditation. *Thompson* does not eliminate the consideration of time in

determining whether a defendant reflected; it just prohibits making the passage of time a proxy for reflection. 204 Ariz. 471, ¶ 29, 65 P.3d at 427. Under the facts of this case, that prosecutor's argument was proper. Thus, the trial court did not abuse its discretion with respect to its ruling on the contents of the state's closing argument.

Premeditation Instruction

¶9 Pesqueira also asserts that the trial court incorrectly rejected his proposed instruction on premeditation. We review the "denial of a requested jury instruction for an abuse of discretion." *State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006). "An error of law committed in reaching a discretionary conclusion may, however, constitute an abuse of discretion." *Id.* Pesqueira was not entitled to an instruction with any particular wording as long as the instructions given adequately informed the jury of the applicable law. *See State v. Salazar*, 173 Ariz. 399, 409-10, 844 P.2d 566, 576-77 (1992). In *Thompson*, our supreme court presented a jury instruction for premeditation to be used in future cases. 204 Ariz. 471, ¶ 32, 65 P.3d at 428-29. Pesqueira contends that the instruction he proposed complied with *Thompson* and should therefore have been given. The actual instruction given here, however, was nearly identical to the instruction in *Thompson*, and adequately informed the jury of the applicable law. That there were slight differences between the instruction in *Thompson* and the one given here does not establish that an error occurred here.

Evidence of Gang Affiliation

¶10 Pesqueira alleges that the trial court improperly permitted evidence to be introduced that permitted inferences of gang affiliation. We review the admission of evidence for an abuse of discretion. *State v. Daniel*, 169 Ariz. 73, 74, 817 P.2d 18, 19 (App. 1991).

¶11 Pesqueira first states that the interruption of one witness's testimony due to possible intimidation left at least one juror "uneasy." During this witness's testimony, a bench conference was held after the witness unexpectedly stopped testifying. During the bench conference, the witness explained that a member of the audience, who looked to the witness like someone who had attacked him before he testified, had made a threatening hand gesture during his testimony.

¶12 Pesqueira did not object during the bench conference that there had been an improper reference to gang affiliation. Consequently, he has forfeited the right to seek relief on appeal for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (objection not preserved at trial forfeited on appeal absent fundamental error). And because Pesqueira does not argue on appeal that the error was fundamental, and because we find none that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal if not argued); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it sees it).

¶13 Pesqueira also objects to the use of certain nicknames during the trial, calling them "indications . . . of gang affiliation." He did not object below, however, to the use of any of the four nicknames that he discusses in his brief. Thus, as we have already explained, he has forfeited the right to review for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. And again, because Pesqueira does not argue fundamental error, and we find none, his argument is waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140; *Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650.

¶14 Pesqueira further objects to certain language that the prosecutor used during trial, asserting that the language is understood to refer to gangs. The prosecutor asked Pesqueira about "be[ing] punked" and about fearing retaliation. But Pesqueira did not object to the use of these terms below, so his objection is forfeited on appeal absent fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Additionally, he does not argue fundamental error, and we find none, so this argument, too, is waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140; *Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650.

Motion for New Trial

¶15 Pesqueira's next argument actually combines two separate arguments. First, he contends the trial court erred by denying his motion for new trial[1] and his

[1]The state argues that Pesqueira's motion for new trial was not timely, and, thus, that this court does not have jurisdiction to address the propriety of the trial court's ruling on the motion. However, the ten-day deadline for Pesqueira to file his motion fell on a

request to interview jurors after the conclusion of the trial. Second, he asserts the court erred by failing to hold a hearing about whether one of the jurors was related to the victim. He provides no authority for his first argument, however, citing no rules, cases, or statutes. That argument is therefore waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

¶16 Pesqueira's second argument is that the trial court should have held a hearing to investigate a potential familial relationship between one of the jurors and the victim. However, he concedes he did not request a hearing below. Thus, he has forfeited the right to raise this issue. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607 (objection not preserved at trial forfeited on appeal). Furthermore, none of the cases Pesqueira cited holds that a hearing is required in such circumstances, absent a motion by the defendant. And as Pesqueira does not argue any resulting error can be characterized as fundamental, and because we find none, the argument is waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140 (fundamental error argument waived on appeal if not raised); *Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650 (court will not ignore fundamental error if it sees it).

¶17 Pesqueira also argues he was denied the opportunity to investigate the possible relationship between a juror and the victim. Rule 18.3, Ariz. R. Crim. P., requires the court to protect jury information "unless good cause is shown . . . which

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Saturday, and he was therefore permitted to file a timely motion as late as the following Monday. *See* Ariz. R. Crim. P. 1.3(a). He filed his motion on that Monday, and it was therefore timely.

would require such disclosure." A trial court's decision on a request to interview jurors after trial is reviewed for abuse of discretion. *See State v. Paxton*, 145 Ariz. 396, 397, 701 P.2d 1204, 1205 (App. 1985).

¶18 Pesqueira raises the issue of a potential relationship between a juror and the victim based on information given to him by a corrections officer after his conviction. The corrections officer allegedly told Pesqueira, and later his representative, that he had received information from an inmate, J.C., claiming that a second cousin of the victim had been on the jury. J.C. received the information from another inmate in his pod, and the corrections officer considered the information to be accurate. J.C. later denied having made the remarks.

¶19 The trial court could have found that this information was not sufficiently credible to warrant contacting the jurors after the conclusion of the trial. Further, the court "accepted as true" the fact that victim representatives denied having any relative on the jury. Thus, the court could have found that no good cause was shown, and it did not abuse its discretion in preventing Pesqueira from contacting jurors.

Admissibility of the Victim's Prior Convictions

¶20 Pesqueira next argues that the trial court erred in excluding evidence of two of the victim's three prior felony convictions, claiming that evidence of the convictions was necessary to establish that the victim was the initial aggressor and that Pesqueira killed the victim in self-defense. We review a trial court's ruling on the admissibility of

evidence of prior convictions for an abuse of discretion. *State v. Green*, 200 Ariz. 496, ¶ 7, 29 P.3d 271, 273 (2001).

¶21 A murder defendant who asserts a justification defense may introduce evidence of the victim's prior felony convictions if the convictions were for violent crimes and if the defendant was informed of the convictions before the homicide. *State v. Taylor*, 169 Ariz. 121, 124, 817 P.2d 488, 491 (1991). The convictions must also be relevant to the defendant's state of mind at the time of the murder. *Id.* Even if the convictions are relevant, however, they may still be excluded pursuant to Rule 403, Ariz. R. Evid., if the trial court determines that their "probative value is substantially outweighed by the danger of unfair prejudice." *Taylor*, 169 Ariz. at 125, 817 P.2d at 492.

¶22 Pesqueira first claims the trial court abused its discretion in excluding evidence of the victim's 1995 conviction for aggravated assault. But during the hearing on the state's motion to exclude evidence of this conviction, Pesqueira stated through counsel that "[h]e really wasn't aware of the [1995] conviction."[2] Pesqueira was therefore not entitled to present evidence of the 1995 conviction. *See Taylor*, 169 Ariz. at 124, 817 P.2d at 491 (defendant may present evidence of victim's prior felony

[2]In its answering brief, the state appears to concede that Pesqueira was aware of the victim's 1995 conviction, stating that Pesqueira "testified that it was his understanding that the [victim's] conviction had occurred 'way back in the day, in the nineties.'" Although Pesqueira indeed made this statement at trial, it referred to when he had seen the victim in the neighborhood, not to the victim's past criminal history. And if Pesqueira's testimony did in fact refer to the victim's 1995 conviction, the evidence of the conviction was not excluded and the statement would render harmless any error in the trial court's decision to exclude evidence of the conviction. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) (error is harmless if we can say "beyond a reasonable doubt, that the error did not contribute to or affect the verdict").

convictions only if, inter alia, defendant was aware of conviction at time he committed murder).

¶23 Pesqueira also contends the trial court erred in excluding as irrelevant evidence of the victim's 2002 conviction for assault of a corrections officer. Although the 2002 conviction was classified as assault, Pesqueira concedes that it merely involved spitting on a corrections officer while incarcerated. And although spitting is insulting, it is not a crime of violence. *See State v. Arnett*, 119 Ariz. 38, 51, 579 P.2d 542, 555 (1978) (defining violence as "'the exertion of any physical force so as to injure or abuse'"), *quoting Webster's New International Dictionary* (3d unabridged ed. 1976). The trial court did not err in excluding evidence of this conviction. *See Taylor*, 169 Ariz. at 124, 817 P.2d at 491 (murder defendant may introduce victim's prior convictions if they were for crimes of violence).

¶24 Pesqueira finally argues that even if the trial court correctly excluded evidence of the victim's 1995 and 2002 convictions during the pre-trial hearing, he should nevertheless have been permitted to present evidence of the convictions during trial because "[t]he jury had gotten a mis-impression" from the state's opening statement that the victim "had only one felony conviction" rather than three. But, for the purposes of trial, the victim had only one relevant prior felony conviction. Accordingly, the state's opening statement did not misrepresent anything and the trial court properly excluded evidence of the victim's convictions.

Portillo Instruction

¶25 Pesqueira next contends the trial court erred when it instructed the jury on reasonable doubt as mandated by the Arizona Supreme Court in *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995). Our supreme court repeatedly has confirmed the validity of that instruction, *see State v. Glassel*, 211 Ariz. 33, ¶ 58, 116 P.3d 1193, 1210 (2005); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003); and, as Pesqueira concedes, we are bound by its rulings. *See State v. Stanley*, 217 Ariz. 253, ¶ 28, 172 P.3d 848, 854 (App. 2007). Therefore no error occurred.

¶26 To the extent that Pesqueira also challenges the content of the state's closing argument, he did not object to the argument below and has, therefore, forfeited this argument absent fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607 (fundamental error analysis applied when defendant fails to object below). Pesqueira has the "burden of persuasion in fundamental error review." *Id*. And he does not argue, nor do we find, any error in the state's closing statements was fundamental. Therefore, he has not sustained his burden in a fundamental error analysis. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140 (forfeited argument waived on appeal if fundamental error not argued); *Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650 (court will not ignore fundamental error if it sees it).

Prosecutorial Misconduct

¶27 Pesqueira next claims that he was denied a fair trial because of several instances of alleged misconduct by the prosecutor. Pesqueira first asserts that the

prosecutor committed misconduct by improperly vouching for the state during opening statements. But Pesqueira did not object to the prosecutor's opening statements on that basis and has, therefore, forfeited any objection to them absent fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607 (fundamental error analysis applied when defendant fails to object below). As we have already explained, the defendant, and not the state, has the "burden of persuasion in fundamental error review." *Id*. And Pesqueira does not argue, nor have we independently found, that any error in the state's opening statements was fundamental. *See Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650 (court will not ignore fundamental error if it sees it). Therefore, he has not sustained his burden in a fundamental error analysis, and we need not address this argument further. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140 (forfeited argument waived on appeal if fundamental error not argued).

¶28 Pesqueira also argues, however, that the state committed prosecutorial misconduct when it "introduced improper inferences of gang affiliation, . . . improperly argued the law, . . . and effectively lowered the burden of proof." Pesqueira does not explain why these instances constituted prosecutorial misconduct, and instead merely claims that each instance constituted misconduct as "stated . . . above" in a previous argument of the opening brief. But Pesqueira's previous arguments did not involve prosecutorial misconduct. And prosecutorial misconduct is not merely legal error. *State v. Martinez*, 221 Ariz. 383, ¶ 36, 212 P.3d 75, 85 (App. 2009). Pesqueira has therefore failed to develop any argument regarding these instances of purported prosecutorial

misconduct and has waived such an argument on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall include an argument stating party's contentions, reasons therefor, and necessary supporting authority); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838 ("Failure to argue a claim on appeal constitutes waiver of that claim."). Pesqueira has not demonstrated that he was denied a fair trial due to any prosecutorial misconduct.

Atmosphere of Trial

¶29 Pesqueira submitted a supplemental brief arguing that the trial court should have declared a mistrial due to the gesture that an audience member made to the testifying witness and other possible perceptions of gang influence during trial. "If a party wants a mistrial, it ordinarily must ask for one" because sua sponte mistrials may raise double jeopardy issues. *State v. Laird*, 186 Ariz. 203, 207, 920 P.2d 769, 773 (1996). "Absent fundamental error, a defendant cannot complain if the court fails to . . . sua sponte order a mistrial." *State v. Ellison*, 213 Ariz. 116, ¶ 61, 140 P.3d 899, 916 (2006). And even if the defendant establishes fundamental error, he must also prove that this error caused him prejudice. *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶30 Pesqueira never moved for a mistrial, but he now argues that the court's failure to sua sponte order a mistrial was fundamental error. However, even if there were error here in the court's failure to sua sponte order a mistrial, and it could be characterized as fundamental, Pesqueira fails to sustain his burden of proving that any error caused him prejudice. *See id.* Nothing in the record establishes any jurors had seen the hand gesture supposedly made by the spectator or that the jurors otherwise had been

influenced in their deliberations by the alleged atmosphere. Thus, we reject Pesqueira's argument that the trial court should have sua sponte declared a mistrial.

Conclusion

¶31 In light of the foregoing, we affirm Pesqueira's conviction and the sentence imposed.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

PETER J. ECKERSTROM, Judge